

NOS. 87-507, 87-508

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PALM BEACH NEWSPAPERS, INC.,

Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, THE STATE OF FLORIDA and LINDA AURILIO,

Respondents.

and

THE MIAMI HERALD PUBLISHING COMPANY,

Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I. DO THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT TO ATTEND PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE?

II. DO THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT OF ACCESS TO PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE WHICH MAY OR MAY NOT HAVE BEEN TRANSCRIBED BUT WHICH HAVE NOT BEEN FILED WITH THE CLERK OF COURT OR THE JUDGE?

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STATEMENT OF THE CASE

The Florida Supreme Court held that the press does not have a First Amendment right to be present at pretrial discovery depositions in criminal cases or to demand copies of depositions which are not filed with the trial court. **Palm Beach Newspapers, Inc. v. Burk**, 504 So.2d 378, 382, 383 (Fla. 1987). The Florida Supreme Court rendered its opinion in response to questions certified by the District Court of Appeal, Fourth District of Florida. In this brief, the questions presented for review have been restated to more closely reflect the questions certified to and decided by the Florida Supreme Court. These questions have been raised separately in the petitions of Palm Beach Newspapers, Inc., and the Miami Herald.

In reaching its decision, the Florida Supreme Court reviewed the recent decisions of this Court on access to criminal judicial proceedings and it considered the origin and nature of discovery rights of parties under modern practice, both federal and state. The court found that deposition proceedings are not public components of a trial and were not open to the public at common law. Id. Non-parties do not possess discovery rights and there is no independent right outside the trial process to the information sought in discovery. Id. In so holding, the Florida Supreme Court relied on this Court's decision in **Seattle Times Co. v. Rhinehart**, 467 U.S. 20 (1984), wherein the **Times**, a party to a lawsuit, was accorded no constitutional right to publish information acquired solely by virtue of the pretrial discovery process.

The decision of the Florida Supreme Court expressed deep concern that public access to discovery information at the moment it is produced in a deposition presented an unacceptable hazard to the constitutional rights to a fair trial and a speedy trial, to the privacy rights of parties and non-parties and to the right under the Florida Constitution to trial in the venue of the alleged crime. 504 So.2d at 383. The purpose of criminal discovery in Florida - assisting in the trial or resolution of criminal charges - would not be served by public access to criminal deposition proceedings or to unfiled depositions. Id.

Finally, the court ruled that discovery depositions are not judicial proceedings and that previous Florida case law acknowledging a nonconstitutional right of access to pretrial suppression hearings did

not, by analogy, mandate a similar right of access to deposition proceedings. Id. at 384. The decision did state that once a transcribed deposition is filed with the trial court, it is open to public inspection. Id.

Many of Petitioner's assertions about Florida discovery proceedings are not based on the record, particularly those having to do with the press's alleged "historical access" to the deposition process under Florida practice. The fact that the press may have had occasional access to a filed deposition or to the taking of a criminal deposition by order of a trial court does not thereby establish either a constitutional right or a tradition of access. The state disagrees with the Petitioners' representations about historical access in the following respects.

Palm Beach Newspapers contends that prior to its amendment in 1982, **Florida Rule of Civil Procedure 1.310(f)** required depositions to be filed with the clerk of court and that this filing requirement applied to depositions in criminal cases by virtue of **Florida Rule of Criminal Procedure 3.220(d).**[1] (Pet. at 18) The Miami Herald makes a similar contention. (Pet. at 6) Whether this is so or not, neither rule required that depositions be transcribed. In any given case, it may have been that no deposition was transcribed and filed. There is no record evidence that tells us how many depositions

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[1]This is by no means clear on the face of Criminal Rule 3.220(d) which simply provides in pertinent part that "[t]he procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure." (Petitioners' Joint Appendix at 102).

were filed in criminal cases over any period of time and thus nothing to support Palm Beach's representation that "[a]s a practical matter, the filing requirement assured public access to depositions . . . . Reporters routinely reported depositions to the public as they did other judicial proceedings." (Pet. at 18) If the rule did not compel the transcribing of a deposition, we cannot agree that public access was "assured" or that depositions were "routinely reported."

Petitioner contends that the concerns expressed by the Florida Supreme Court are wholly unfounded in view of Florida's "extensive experience with allowing access to depositions . . . ." (Pet. at 20) There is no record evidence to support this assertion. Petitioner Palm Beach cites only five trial court decisions preceding the decision below that allowed press

attendance at a criminal deposition. (Pet. at 19, n. 14.) The Miami Herald cites the identical cases. (Pet. at 5, n. 3) The earliest of these cited rulings occurred in 1979. We are compelled to disagree that five trial court rulings in criminal cases and three in civil cases reflect "extensive experience" with public access to depositions. Moreover, there apparently was no Florida appellate decision prior to Burk that recognized any constitutional right of access on the part of the press or public to discovery depositions.

SUMMARY OF ARGUMENT

Review of the decision of the Florida Supreme Court is unwarranted because neither the press nor public have any First Amendment right to attend the taking of depositions or to demand copies of depositions from the litigants. There is no conflict in case law as to this issue.

The discovery process is intended to permit a wide and, indeed, almost uninhibited range of inquiry in order to aid the resolution of litigation - whether criminal or civil. Open access to depositions would clearly disserve this purpose. The access rights demanded by the press could easily result in the publication of possibly irrelevant and inadmissible but nonetheless damaging information. Information produced in discovery is often unpredictable, and because the press would have immediate access to it, protective orders are inadequate to prevent dissemination of harmful or prejudicial revelations. Criminal defendants in particular should not be burdened with having to litigate against the press in order to protect their constitutional rights to a fair and speedy trial.

ARGUMENT

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE SINCE THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS EITHER TO THE TAKING OF DEPOSITIONS OR TO UNFILED COPIES OF DEPOSITIONS, AND THERE IS NO CONFLICT AMONG DECISIONS.

Petitioners invoke the discretionary jurisdiction of this Court pursuant to 28 U.S.C. §1257(3)(1976), which provides that review of a state supreme court decision may be had by writ of certiorari where

> the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . .

No state statute is at issue, and the purported "right" asserted - that of a non-party to legal proceedings to sit in on depositions or to demand copies of unfiled depositions - has no constitutional status.

Moreover, the rules of this Court provide that a writ of certiorari "will be granted only where there are special and important reasons" such as

> [w]hen a state court of last resort has decided a federal question in a way in conflict with the decisions of another state court of last resort or of a federal court of appeals.

Sup.Ct.R. 17. Far from presenting a conflicting holding, the decision of the Florida Supreme Court is consistent with other state and federal decisions concerning access to and use of discovery materials. The only inconsistent decisions which Petitioners cite are a handful of Florida trial court rulings.

Petitioners point to no decision of this Court or any federal appeals court or state supreme court holding that the taking of a deposition is a judicial proceeding that the press has a constitutional right

to attend. Petitioners cite no appellate decision holding that the press has a right to demand a copy of a deposition from a litigant when the deposition has never been filed with the trial court and is thus not a court record. In fact, as will be discussed, all decisions on which Petitioners rely for conflict involve either 1) discovery material filed with and under the immediate control of a trial court; or 2) confidential information or trade secrets produced in discovery which were subject to a protective order entered under **Rule 26(c), Fed.R.Civ.P.**, to control the parties' use of the information.[2]

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[2]The instant questions, which arose in a state criminal prosecution, are unlikely to occur in the course of federal criminal prosecutions since the Federal Rules of Criminal Procedure do not permit the routine taking of discovery depositions. See Rule 15, Fed.R.Cr.P.

To date, this Court has held that only those proceedings taking place under the direct and immediate control of a trial court are judicial proceedings to which there is a qualified right of access. **Press Enterprise Co. v. Superior Court**, ____ U.S. ____, 106 S.Ct. 2735 (1986)(preliminary hearing in criminal case); **Press Enterprise Co. v. Superior Court**, 464 U.S. 501 (1984)(jury selection proceedings in criminal case); **Waller v. Georgia**, 467 U.S. 39 (1984)(pretrial suppression hearing); **Richmond Newspapers, Inc. v. Virginia**, 448 U.S. 555 (1980)(criminal trial). With respect to the discovery process, this Court has recently stated that "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law . . . and, in general, they are

conducted in private as a matter of modern practice." **Seattle Times Co. v. Rhinehart**, 467 U.S. 20, 33 (1984). Moreover, in **Seattle Times** this Court unequivocally stated that "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." Id. at 32. Petitioner cites no authority showing that the same conclusions would not be true for discovery proceedings in criminal cases.

The cases on which Petitioners rely simply do not support a claim of conflict. The only state supreme court decision cited for conflict is **State v. Cianci**, 496 A.2d 139 (R.I. 1985). That case, however, concerned the press's objection to a protective order sealing all discovery material to be filed with the trial court before trial. There was no issue of press or public access to the

actual taking of depositions or to unfiled or untranscribed depositions in the hands of the parties.

Petitioners' assertions of conflict with federal appellate decisions are similarly flawed. They cite only one case that concerns access to unfiled discovery material, and that case clearly holds that the press has no constitutional right to such material and a party cannot be compelled to disseminate it to the press. **Oklahoma Hospital Association v. Oklahoma Publishing Co.**, 748 F.2d 1421 (10th Cir. 1984), cert. denied, 473 U.S. 905 (1985). Every other federal appellate decision relied on for conflict with **Burk** involves access to either 1) filed discovery materials, which are court records; or 2) discovery material subject to a **Rule 26(c), Fed.R.Civ.P.**, protective order, entered to control the parties' use of discovered

information. See In re Alexander Grant & Co. Litigation, 820 F.2d 352, 355 (11th Cir. 1987); Anderson v. Cryovac, Inc., 805 F.2d 1, 11-12 (1st Cir. 1986); Cippollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986); In re Agent Orange Product Liability Litigation, 821 F.2d 139 (2d Cir. 1987); In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1339 (D.C. Cir. 1985). None of these cases suggests that the First Amendment compels press access to either the taking of depositions or to unfiled discovery material in the hands of litigants.

Petitioners also cite United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), which recognizes a qualified right of access in a criminal case to a filed and sealed bill of particulars containing the names of unindicted coconspirators. If anything,

Burk, which also recognized a qualified right of access to a filed deposition, is consistent with **Smith**.

Whether these federal appellate decisions are in all respects correct and harmonious is not the issue before this Court nor any basis for review of the **Burk** decision. The point is that they do not conflict with the Florida Supreme Court's decision in **Burk** because they do not decide the issue of press and public attendance at depositions or the right of access to depositions in the hands of parties who are unwilling to share them with the press.

We address finally the overwrought assertions that the **Burk** decision "is the most far-reaching limitation of the public's First Amendment right of access to be based on **Seattle Times**," that it imposes "a rule against access which is . . . absolute," and that it displaces

traditional trial court authority with "the whim of a single party." (Palm Beach Newspapers Pet. at 18, 24, 25) Petitioners have failed to establish a First Amendment right for the press or public - as nonparties - to attend depositions; indeed, the very case authorities they cite cannot by any stretch of the imagination be read to recognize such a right. Moreover, the "rule" established in **Burk** is scarcely absolute. While it may be that the objection of one party would suffice to exclude the press from a deposition, the decision in no way prevents the parties from agreeing to let the press attend. And, even assuming the press is excluded by the objection of one party, the decision in no way prevents any party from later providing to the press a copy of the transcribed deposition.

Given that discovery rules allow extensive intrusion into the affairs of litigants and that discovered information could be damaging to reputation and privacy if made public, considerations this Court found compelling in **Seattle Times**, it avails nothing to argue that the decision below operates at the "whim" of the parties. As the **Burk** decision recognized, it is not possible to know in advance precisely what information will be elicited at a deposition, and once sensitive or damaging information becomes public it is too late to seek a protective order. In arguing that press and public access should be controlled by the trial court's power to issue protective orders, Petitioners fail to explain how lawyers can be clairvoyant about information that has yet to come to light or how they can predict the effect of unknown information on the right to a fair

trial or a party's privacy interests. Petitioners simply do not want to acknowledge that "discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." See **Seattle Times Co. v. Rhinehart**, 467 U.S. 20, 24 (1984).

The potential for abuse of the discovery process is not diminished even if access is sought only to unfiled depositions rather than to their actual taking. A presumptive right to publish discovered information that might be inadmissible, irrelevant, defamatory or prejudicial simply subverts the very purpose of discovery, as **Burk** pointedly states. 504 So.2d at 384. Discovery becomes particularly oppressive when those whose rights and interests are at stake in a lawsuit must engage in additional litigation with the press to protect

themselves from public dissemination of possibly irrelevant, unreliable and inadmissible information. In this context, protective orders become part of the problem instead of the answer, for few persons can match the resources the press can muster for litigation. Unless strictly limited to the "sole purpose" of assisting in preparation and trial of litigated disputes, discovery will become intolerably oppressive, invasive and expensive.

CONCLUSION

The Florida Supreme Court's decision in **Palm Beach Newspapers, Inc. v. Burk** is consistent with other state and federal appellate court decisions finding no First Amendment or common law right of access to unfiled discovery information. The admission of the press and public to pretrial depositions can only serve to

increase the time and expense of litigation, whether criminal or civil, undermine the fundamental rights to a fair and speedy trial, and thwart the candor and openness of the discovery process. Under these circumstances, and in the absence of decisional conflict, certiorari review should be denied.

Respectfully submitted this 26th day of October, 1987.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in this case was served on October 26, 1987, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositng three true copies in the United States post office or mailbox, with first-class postage prepaid, addressed to: **RAY FERRERO, JR., WILTON L. STRICKLAND, RICKI TANNEN**, 707 S.E. 3rd Avenue, 6th Floor, Ft. Lauderdale, FL 33316; **DONALD M. MIDDLEBROOKS, L. MARTIN REEDER, THOMAS R. JULIN**, 4000 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131; **NELSON BAILEY**, Suite 303, 324 Datura Street, West Palm Beach, FL 33401; **KIRK VOLKER**, Assistant State Attorney, 315 Third Street, West Palm Beach, FL 33401; **GERALD B. COPE, JR., LAURA BESVINICK, GREER, HOMER, COPE & BONNER, P.A.**, 4870 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; **RICHARD J. OVELMEN**, General Counsel, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; and **MARGARET GOOD**, Assistant Public Defender, Public Defender's Office, 9th Floor/Governmental Centre, 301 North Olive Avenue, West Palm Beach, FL 33401.

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